

**STATE OF MAINE  
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION  
BUREAU OF INSURANCE**

IN RE: REVIEW OF AGGREGATE	)	<b>Consumers for Affordable</b>
MEASURABLE COST SAVINGS	)	<b>Health Care</b>
DETERMINED BY DIRIGO HEALTH	)	
FOR THE SECOND ASSESSMENT YEAR	)	<b>Reply to Joint Letter</b>
	)	<b>Concerning Undisclosed</b>
	)	<b>Affiliations of Dirigo</b>
	)	<b>Board Member</b>
Docket No. INS-06-900	)	

**Now comes** intervenor Consumers for Affordable Health Care, by and through its legal counsel, with its reply in opposition to the joint letter concerning undisclosed affiliations of Dirigo board member dated June 28, 2006 pursuant to Bureau of Insurance Rule Chapter 350, section 7.C. and Orders on Intervention and Procedures, section VI.

Legal counsel from several of the largest law firms in the state of Maine, Pierce Atwood (Christopher Roach), Verrill Dana (William Stiles), Curtis Thaxter (D.Michael Frink), and Preti Flaherty (Bruce Gerrity), representing the interests of intervenors: Anthem Health Plans of Maine, the Maine State Chamber of Commerce, the Maine Association of Health Plans, and the Maine Automobile Dealers Association Insurance Trust respectively, filed a letter dated June 28, 2006 to express their “concern” with the alleged non-disclosure of a board member regarding his affiliations. Their letter of “concern” acknowledges that this tribunal does not have jurisdiction to provide redress yet they pursue an unavailable legal remedy.

Their accusations are unsupported by the facts, and contrived to achieve a result that the law does not allow. Their statements border on sanctionable pursuant to section IX, Failure to Comply with Rules and Orders, Orders on Intervention and Procedures, June 15, 2006, at p. 9. The Superintendent should strike the filing and prohibit the intervenors from introducing any argument on this issue at the July 12<sup>th</sup> proceeding.

**I. “Concerned” Intervenors Misrepresented Their Notice of Director McCann’s Affiliations**

All of the “concerned” intervenors, through their legal counsel, signed onto a joint letter to the Superintendent dated June 28, 2006. They state that their knowledge of Director McCann’s affiliation with Consumers for Affordable Health Care was through a June 16, 2006 filing made by Consumers for Affordable Health Care with the Superintendent. Without stating whether this was their **first** knowledge of his affiliation with CAHC they say: “This information came to light after a review of a June 16, 2006 filing letter by CAHC on which Mr. McCann is listed as a board member.” Each of the “concerned” intervenors, represented by the same legal counsel who signed onto the aforementioned letter to the Superintendent, are parties to Maine Association of Health Plans v. Dirigo Health Agency, Docket No. AP-05-94. Each of the “concerned” intervenors, through the same legal counsel, received CAHC’s Notice of Appearance and Statement of Position in that case on January 11, 2006. That filing, like the June 16, 2006 filing, prominently lists Director McCann as a member of Consumers for Affordable Health Care’s board of directors. *See* Exhibit 1. Why each of the legal counsel to the “concerned” intervenors chose the June 16<sup>th</sup> filing -- while overlooking the January 11, 2006 filing -- to represent that they were unaware of Director McCann’s affiliation with Consumers for Affordable Health Care until two weeks ago, can only be surmised.

## **II. Director McCann Publicly Disclosed His Professional and Business Affiliations**

On April 10, 2006, almost three months ago, Director Edmund McCann was nominated to the Dirigo Health Agency Board of Directors by Governor John E. Baldacci. *See* Exhibit 2. The nomination was publicly posted as Posting #643 that same day. *See* Exhibit 3. It was also posted to the Governor’s website at <http://www.maine.gov/governor/baldacci/boards&commissions/nominations2006.htm>. As with all appointments that require review by a legislative committee and confirmation by one of the bodies of the Maine Legislature, a letter was sent by the Governor to the appropriate legislative officers, here the President of the Senate (*See* Exhibit 4) and the Speaker of the House of Representatives (*See* Exhibit 5) on April 10, 2006. Director McCann was required to complete a “Legislative Staff Questionnaire for Gubernatorial Nominees” (“Questionnaire”) *See*

Exhibit 6. The Questionnaire asks the nominee to list “Professional and Business Affiliations and Associations.” It was completed by the nominee in his handwriting. The second of the five organizations that he listed as a professional or business affiliation -- the first being his employer -- was “Consumers for Affordable Health Care.” Contrary to the statements of legal counsel to the “concerned” intervenors, Director McCann disclosed his affiliation with “Consumers for Affordable Health Care.”

Only five of the twenty-one nonprofit and/or community based organizations on which Director McCann serves in an **unpaid, volunteer** capacity could fit into the available space provided on the completed legislative “Questionnaire.” To accurately complete the “Questionnaire,” he added a notation in the available space that states: “-- More -- See Bio.” In his attached “Bio,” he provided a list of “Boards and Commissions” on which he participates. In it he states “Consumers for Affordable Health Care” as one of those organizations to which he volunteers his time. *See* Exhibit 7. As legal counsel to “concerned” intervenors well know, Consumers for Affordable Health Care Coalition lists Director McCann as a board member since legal counsel attached not only a copy of CAHC’s webpage to their filing but also a copy of CAHC’s 2004 IRS Form 990 Filing. *See* <http://www.maine cahc.org/coalition/memberlist.htm>

“Concerned” intervenors go through great pains to contrive a “conflict” for Director McCann. It falls flat. Unlike DHA Board Director Dana Connors, who is a highly-compensated employee, in fact, the President and CEO, of the Maine State Chamber of Commerce, whose members have a direct and substantial interest in the outcome of the instant proceeding, Director McCann is an **unpaid, volunteer** director of a nonprofit organization with an average annual budget of less than \$25,000 whose mission is affordable, quality health care for every man, woman and child. Neither Director McCann, nor the organization to which he serves as a volunteer director, gain one penny from the outcome of this proceeding. If there were any gain to be made by Director McCann’s participation in the proceeding, it would be that of the people of Maine in need of affordable health care coverage.

A public hearing was held before the Insurance and Financial Services Committee of the Maine State Legislature on April 25, 2006. The Legislative Information Office posted the “Notice of Confirmation Hearing” with the Kennebec Journal, the Bangor Daily News, the Portland Press Herald, and the Lewiston Sun Journal on April 17<sup>th</sup>. *See* Exhibit 8. During that hearing, attended by representatives of the intervenors and/or their legal counsel, testimony was provided identifying Director McCann’s affiliations and, in particular, his position as an **unpaid, volunteer** director to the board of Consumers for Affordable Health Care, a Maine-based nonprofit organization and the unanimous vote of that board to support his nomination.

Now, *six months after* their first known and documented notice of Director McCann’s affiliation with Consumers for Affordable Health Care and *almost three months after* the nomination, the public disclosures, and the public hearing before the IFS Committee and the confirmation by the Maine Senate, “concerned” intervenors announce, without specifically stating that it was their first notice, that the information “came to light” of Director McCann’s affiliations on June 16<sup>th</sup>. The statement defies the facts. Conveniently overlooking Consumers for Affordable Health Care’s January 11, 2006 court filing in AP-05-94 to which they are all legal counsel who received the filing, and claiming lack of awareness of (or failing to read the public disclosures that accompanied the Governor’s nomination) in order to impugn Director McCann, and cast doubt on the **unanimous** DHA Board decision of the three members deciding it, rings hollow.

## **II. Concerned Intervenors Waived Their Right to Claim Prejudice, Bias or Conflict. The Proper Forum to Raise the Issue Was Before the Board of the Dirigo Health Agency.**

Intervenors have waived any right to raise their “concern” at this point. The proper time to raise their concern was before the board. Their earliest known and documented notice of Director McCann’s affiliation with Consumers for Affordable Health Care was January 11, 2006. They had public notice of Director McCann’s appointment as of April 10<sup>th</sup> and again by newspaper notice as of April 17<sup>th</sup>. They and/or their representatives attended the public hearing on the nomination of Director McCann on April 25<sup>th</sup>. They failed to review the public filings, postings and disclosures, yet now

complain to the Superintendent that they didn't know. Their goal is obvious, yet not permitted by the law. The Law Court stated in MacCormick v. MacCormick, 513 A.2d 266: **(Me. 1986)**

“It is a cardinal rule of American jurisprudence that the trial process, including the conduct of the trial judge, should be wholly free, disinterested, impartial, and independent. It is also established law, however, that a party must make a timely motion to disqualify a judge upon the discovery of grounds for the disqualification. A motion for disqualification should come at the earliest moment after knowledge of the facts that suggest recusal. Failure to make a timely objection will result in a waiver. A party may not elect to take a chance on gaining a favorable decision and then, if the decision is unfavorable, raise grounds for recusal of which he or counsel had actual knowledge prior to the decision being made. Once a judgment has been entered in a case, a party has waived his right to disqualify the trial judge and if he has waived that issue, he cannot be heard to complain following an unfavorable result.”

Intervenors' concerns are too little and too late.

**III. Concerned Intervenors Failed to Meet the Procedural Order Requiring Legal Support for Their “No Deference” Position Because They Have No Support. The Letter of Concern Is Defective. Their Actions Can Only Be Viewed As Political.**

Concerned intervenors filed their letter of concern with the Superintendent on June 28, 2006.

In it, their lawyers state: “The determination of whether the DHA Board’s decision for year 2 is valid, or instead *void ab initio* based on Mr. McCann’s affiliation and failure to disclose is, in intervenors’ view, a determination not for the Superintendent, but instead, for the Maine Courts. Intervenors respectfully suggest, however, that the record, evidence and factual and legal determinations made by the DHA Board must be viewed in the context of that undisclosed affiliation to CAHC and, as such, those determinations should be entitled to no deference whatsoever.” Joint Letter Concerning Undisclosed Affiliations of Dirigo Board Member, at p. 2 (Underline added)

This is a legal proceeding. Having acknowledged that the tribunal has no jurisdiction to address their concerns (and thereby are wasting the precious and few resources of the tribunal)the intervenors “**suggest**” ( i.e., request) unavailable legal remedies without legal support. The Superintendent’s “Orders on Intervention and Procedures” dated June 15, 2006 states:

Every request or motion for an order or ruling *of any kind* by the Superintendent shall be in writing, unless made on the record during a hearing to which the request or motion is related. Every request or motion should include or be accompanied by a clear statement of the support for the order or other action sought. The statement supporting the request or motion should also include any arguments with respect to policy or law that have a bearing on the request.

[...] If legal arguments are advanced, the supporting statement accompanying the motion shall include citations to all supporting authorities relied upon by the moving party.” (Italics added)

Orders on Intervention and Procedures, June 15, 2006, Section VI. Motions, at pp. 8 – 9

To be blunt, the legal counsel for the “concerned” intervenors should not waste everyone’s time with an unsupported letter of concern. At this point, by their own admission, their filing is “defective or insufficient.” Under Rule Chapter 350, section 6 of the Bureau of Insurance, the Superintendent must notify the filers of the defect or insufficiency of the filing within 35 days and deem the filing as not filed.

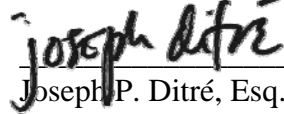
**IV. Consumers for Affordable Health Care Ask That The Superintendent Grant the Concerned Intervenors An Opportunity to Properly Raise Their Concerns In An Appropriate Forum and Remand the Case to the Dirigo Health Agency Board of Directors for the Collection of Evidence on Any Outstanding Issue of Fact or Law.**

The intervenors have acknowledged that the Superintendent does not have jurisdiction to address their concerns. Clearly, the Dirigo Health Agency board does. Pursuant to section VI of the Superintendent’s Orders on Intervention and Procedures, and in accordance with 5 M.R.S.A. §9052 and Bureau of Insurance Rule Chapter 350, section 3.A., CAHC requests that the Superintendent, in the interests of fairness and as a reviewing tribunal, provide the intervenors with the remedy they seek and remand the proceeding to the Dirigo Health Agency board to provide or clarify “evidence and factual and legal determinations made by the DHA Board.” The Maine Supreme Judicial Court has held that: “The remedy for an agency's failure to act on all matters properly before it or to make sufficient and clear findings of facts is a remand to the agency for findings that permit meaningful judicial review.” Kurlanski v. Portland Yacht Club, 782 A.2d 783 (Me. 2001). Since the intervenors admit that the Superintendent cannot determine whether the filing is “valid, or instead *void ab initio* based on Mr. McCann’s affiliation and failure to disclose,” CAHC requests that the Superintendent provide the intervenors with the opportunity to make their arguments before the Dirigo Health board on remand. In addition, CAHC requests that the board be given the opportunity to provide the

Superintendent with any additional “evidence and factual and legal determinations” that would promote efficiency and judicial economy on any matter.

Date: June 30, 2006

Respectfully submitted,



---

Joseph P. Ditré, Esq.  
Bar Number 3719

Jack Comart, Esq.  
Maine Equal Justice  
122 Sewall Street  
Augusta, ME 04330  
Ph: 626-7058  
[jcomart@mejp.org](mailto:jcomart@mejp.org)

**Counsel to**

Consumers for Affordable Health Care  
P.O. Box 2490, 39 Green Street  
Augusta, Maine 04338-2490  
Ph: 207-622-7045  
Fx: 207-622-7077  
Email: [jditre@mainecahc.org](mailto:jditre@mainecahc.org)